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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 221

JAMES M. LANDIS, *et al.*,

Petitioners,

vs.

THE NORTH AMERICAN COMPANY,

Respondent.

No. 222

JAMES M. LANDIS, *et al.*,

Petitioners,

vs.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, INCORPORATED,

Respondent.

ANSWER OF RESPONDENTS TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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DECREE OF COURT BELOW.

The petitioners seek to have this Court review identical decrees of the United States Court of Appeals for the District of Columbia entered on June 22, 1936, reversing interlocutory orders of the Supreme Court of the District of

Columbia which granted motions of the petitioners to stay all proceedings in respondents' suits against the petitioners "until the validity" of the Public Utility Holding Company Act of 1935 "has been determined by the Supreme Court of the United States in the case of the *Securities and Exchange Commission vs. Electric Bond and Share Company, et al.*, now pending in the District Court of the United States for the Southern District of New York or until that case is otherwise terminated".

RESPONDENTS' SUITS.

The respondents' suits are bills in equity to enjoin the petitioners (the members of the Securities and Exchange Commission, the Attorney General, and the Postmaster General) from enforcing the Public Utility Holding Company Act of 1935 (49 Stat. 803—hereinafter referred to as "the Act") against the respondents on the ground that the Act is unconstitutional as applied to the respondents.

STATEMENT OF FACTS.

The respondents are holding companies of the class which is required by the Act to register under it on or before December 1, 1935. They have not so registered, and their bills, which were filed shortly before that date, declared their intention not to register. The bills invoke the equitable jurisdiction of the court, because of the irreparable damages which they show that the Act has already caused the respondents, and which, as the bills also show, the respondents will continue to suffer in ever increasing amounts until they obtain the *final* relief for which their bills pray.

The bill of the respondent, The North American Company, was filed on November 26, 1935,* (R., p. 2)** and the bill of the respondent, American Water Works and Electric Company, Incorporated, was filed the next day, November 27, 1935 (A. R., p. 2).

On the same day that The North American Company filed its bill, the Commission filed its bill against Electric Bond and Share Company and certain of its corporate subsidiaries, in the United States District Court for the Southern District of New York. This case (hereinafter called "the *Bond and Share* case") is the case in favor of which the respondents' cases have been stayed as aforesaid.† The bill filed by the Commission prays for a writ of mandamus to compel the defendants to register and also seeks to enjoin them from engaging in any of the activities prohibited to unregistered holding companies by the Act.

The respondents' bills base their prayers for equitable relief against the enforcement of the Act primarily *on the fact that the petitioners are at one and the same time vehemently asserting its constitutionality against the respondents‡ while on the other hand refusing to enforce it against them,*—although (since the respondents have refused to register) the petitioners could immediately do so by the simple method of a prosecution for failure to register or by mandamus to compel registration,—and on the

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*In their statement of facts petitioners state that respondents' suits were for the purpose of enjoining *"in limine"* the enforcement of the Act "before it could be put into practical operation". The provisions of the Act foreclosing the use of the mails or any instrumentalities of interstate commerce to unregistered holding companies became effective on December 1, 1935.

**References to the Record are to the printed Record in the *North American Company* case except where otherwise indicated.

†On December 21, 1935, the original bill was superseded by an amended and supplemental bill (R. p. 59). Hereafter all references will be to this amended and supplemental bill.

‡That the Act, if constitutional as to the respondents, *applies* to them is undisputed.

further fact that the impasse thus created is causing the respondents immense and irreparable pecuniary damages which will necessarily accumulate until the respondents obtain a final decision that the Act is unconstitutional as against them.

As to these damages, both bills show in the clearest possible manner (and by detailed reference to the more important provisions of the Act) how the many drastic prohibitions of the Act with reference to unregistered holding companies will cast such a cloud upon the legality of respondents' most characteristic and necessary corporate activities as virtually to paralyze their business for the period during which the validity of the Act as to them remains undetermined (R., pp. 25-31).* And the bills *also* show that the respondents cannot avoid these damages by registering under the Act—that, in fact, registering might well increase their damages,—since by registering the respondents, in place of the outright prohibitions of the Act with respect to unregistered companies, would subject themselves (a) *first* to a regimentation by the Commission so all-pervasive, rigorous, complicated, and confusing as to be equally paralyzing to the normal conduct of their business, and (b) *eventually* to possible complete corporate extinction under the notorious "death sentence" provision of the Act (Section 11). (R., pp. 9-23).

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*That this is also the petitioners' view is clearly enough shown by the following statement made by petitioner Landis, chairman of the Commission, in a press statement of November 8, 1935 (New York Times). He stated that

> "unless a holding company registers, the validity of any issue of securities which it may offer and of all acquisitions of property and of contracts made by it would be in question at least until a *final* decision upon the issue of constitutionality was handed down by the Supreme Court". (Italics ours. See discussion, *infra* p. 13 of petitioner's offer of a *temporary* injunction as an alleged justification of their stay.)

There cannot, therefore, be the slightest question that both bills bring themselves within one of the recognized categories of cases in which injunctive relief is granted against the enforcement of unconstitutional laws prior to actual suits to enforce them and prior also to threats of *immediate* enforcement.*

Within a few days after the filing of respondents' bills five other holding companies filed their bills in the court below seeking, on the same grounds, substantially the same relief sought by the respondents.†

On December 7, 1935, before any answers had been filed by the petitioners herein in the respondents' suits or in any of the other above-mentioned suits in the court below, or by the defendants in the *Bond and Share* case, the petitioners moved for the stay which they obtained in the lower court as above stated. The motion was made and was granted in all the suits in the trial court.

When the motions for the stays were made there were also pending approximately forty other suits in different United States district courts, all seeking substantially the same relief. These suits, or most of them, named as defendants the present petitioners, or some of them, as well as the local federal district attorneys and other local federal officials. The present petitioners declined, however, to appear in these suits voluntarily, and by the appropriate motions on special appearances obtained their dismissal as against themselves (R., p. 238). As a consequence, the only argument in support of their stays which the petitioners now make based on these suits in the district courts is that

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*We shall later comment briefly (*infra*, p. 20) on the suggestions in the Petition for Certiorari that the bills do not show the sort of situation entitling a complainant to injunctive relief against an unconstitutional act.

†One of these bills has subsequently been withdrawn.

they apprehend that some of these suits may be recommenced against them in the District of Columbia. None of them has as yet been so recommenced.

The reasons for the stay advanced in the motion were (1) the pendency of the above suits in the District of Columbia and the district courts attacking the constitutionality of the Act; (2) that the Commission, in order to secure an early determination of the constitutionality of the Act, had commenced the *Bond and Share* case, and that this suit would be prosecuted with all due diligence to the Supreme Court; and (3) that the great number of the other pending suits would "tend to clog the courts, overtax the facilities of the Government and make against that orderly and economical disposition of the controversy which is the Government's aim" (R., pp. 31-32).

The original motion, which was made by the Attorney General and by the general counsel for the Commission, was itself unverified and was not supported by a single affidavit; and, with respect to the inability of the Government departments to handle more than one of these cases until after the final decision of the *Bond and Share* case, *the motion does not contain a single allegation, except the above quoted generality about "over-taxing the facilities of the Government"*. Neither did the respondents see fit subsequently to file any affidavits in support of this rhetoric, although they later made extensive additions to the record in other respects.*

The petitioners do not now assert and never have asserted that the issues in the *Bond and Share* case are

*In this connection we may refer to Equity Rule 51 of the Supreme Court of the District of Columbia which requires applications for continuances beyond the term to be supported by affidavit. Law Rule 45 requires all applications for continuances to be so supported. The Rules do not specifically refer to "stays".

identical with those of the respondents' cases. They assert only that the issues in all the cases are such that the decision in the *Bond and Share* case will "tend to simplify" the issues in respondents' cases.*

In open court during the oral argument of the motion counsel for the respondents reviewed the offers which had previously been made to Government counsel by counsel for the respondents and by representatives of the utility industry to arrange for the selection of a few representative test cases, to be consolidated for trial. After stating that Government counsel had ignored these offers, counsel for the respondents renewed the offer in open court. This proposal was openly rejected by the Attorney General (R., p. 249).

On January 6, 1936, the trial court filed its aforesaid opinion granting the stay (R., pp. 42-46).

On February 17, 1936, the United States Court of Appeals for the District of Columbia allowed a special appeal from the stay order (R., p. 47).**

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*The striking differences between the Bond and Share system and the respondents' systems on such vital facts as, for example, whether their businesses constitute interstate commerce and are therefore subject to the jurisdiction of the Federal Government, is apparent from a comparison of the Commission's bill of complaint in the *Bond and Share* case (R., pp. 106-233) with the bills in respondents' suits (R., pp. 2-32; A. R., pp. 2-30). Such a comparison is briefly made in the footnote at page 15, *infra*.

**On February 19, 1936, counsel for the defendants below filed a motion with accompanying affidavits, attaching as exhibits thereto, among others, a copy of the amended and supplemental bill in said *Electric Bond and Share* case and the answer in said suit filed long after the decision of the trial court—in order to make a formal record of the statements made in argument on said motion for the stay (R., pp. 48-233). Pages 61 to 233 of the record relate entirely to the *Electric Bond and Share* case.

On February 26, 1936, respondents answered this motion to make a record after the fact but agreed to waive the irregularities and informalities, and stipulated that said affidavit with accompanying exhibits might be considered as a part of the record on such special appeal (R., pp. 233-236, 238-239).

The appeal was argued in the Court of Appeals April 8, 1936, and decided June 22, 1936 (R., pp. 266-267).

As the Petition for Certiorari has had the effect of continuing the stay despite the reversal by the Court of Appeals, the stay will therefore have already run for about ten months before the Petition for Certiorari comes before this Court. In other words, if the stay was improvidently granted (as the Court of Appeals has held) the petitioners will, by their unwarranted and unprecedented motion, have obtained a delay to which they were not entitled of at least ten months, during all of which time the respondents have been suffering the irreparable damages alleged in their bills.

REASONS FOR DENYING THE WRIT.

The Only Question Presented.

We respectfully submit that the sections of the Petition for Certiorari entitled "Specifications of Error to be Urged", and "Reasons for Granting the Writs" misconceive and misstate both the actual decision of the Court of Appeals and its implications. We refer particularly to the second, third and fourth specifications of error (Petition, pp. 23-24) and to the statements contained under "Reason" (1) as to what the Court of Appeals "has decided" and as to what its decision "obliges" a lower court to do (Petition, p. 24).

We submit that the one and only question before the Court of Appeals and the question to which it rigidly confined its decision was whether, on the facts shown by this record, the trial court abused its discretion in granting the particular stay of proceedings which it did grant.

This is made clear by the language of the opinions themselves.

Judge Van Orsdel's opinion, concurred in by Judge Martin, states (R., p. 269):

> *"The sole question,* therefore, for our consideration is whether or not the court below was justified in granting the stay in these cases; whether or not in so doing the court *abused its discretionary power* in the control of its docket." (Italics ours.)

Judge Groner's separate concurring opinion states (R., p. 271):

> "On this appeal the question for our decision is whether the lower court had the right and power to enter the order—and if it had the power, whether the entry of the order in the form in which it appears was an abuse of discretion."

Judge Groner then goes on to state:

> "Undoubtedly a Federal District Court may grant a stay in a case pending before it * * * ," and that "Ordinarily such orders are within the sound discretion of the Court."

And after discussing the facts he concludes as follows (R., p. 273):

> "But the present order goes beyond that limit [of discretion] and in that respect was *improvidently entered."* (Italics ours.)

Judge Stephens' dissenting opinion begins with the following sentence (R., p. 273):

> "I am unable to agree that the trial court abused its discretion."

It is clear from the above that the "power" of the court to grant stays was taken for granted by all the judges, and

that the decision of the majority is simply and solely to the effect that *this particular stay,* constituted, on the particular facts in this case, an abuse of a judicial power the limits of which are necessarily defined in terms of sound judicial discretion.

Specifically, then, the only question presented by the present Petition is simply this: whether, on the facts shown by the record, the trial court abused its discretion in staying the respondents' suits *during a period which commenced even before answers to the bills had become due and which will not end until the Bond and Share case is finally decided by this Court or otherwise finally disposed of.** It goes without saying (a) that no question is presented here as to what *other* "stay" or other delay the petitioners might have been entitled to had they asked for it, and (b) that the vacation of the stay order will not prejudice the right of the petitioners to have granted to them any other extension of time, adjournment, or other delay in the case to which they may be able to show themselves entitled at any time hereafter.

I.

NO QUESTION OF GENERAL IMPORTANCE IS PRESENTED.

Petitioners themselves do not urge that their Petition for Certiorari involves any constitutional question, important or otherwise. Neither does it involve any question of general public importance—since no one doubts the inherent general "power" or "jurisdiction" of all courts to grant, without

*The only qualification of the stay is that the *Bond and Share* case be prosecuted with due diligence by the petitioners. Delays, however protracted, that may be caused by the *Bond and Share* defendants are not provided for.

the specific authorization of a statute, in a proper case, a "stay" of any suit before it, *i.e.*, a cessation of *all* further proceedings therein as distinguished from the granting of delays or adjournments of specific steps therein. It is therefore idle to argue, as petitioners seem to do, that the case is of general importance because it presents a question as to the "power" of the lower court to grant the stay in question here—except in the sense that any court may be said to have acted without "power" when the boundaries of the particular "power" exercised are (as they obviously are here) necessarily co-terminous with the limits of sound judicial discretion, and where those limits have been transgressed. In other words, it is mere verbal fencing for the petitioners to argue that the instant case presents *anything whatever beyond the question whether on the facts shown by the record the lower court abused its discretion in granting the particular form of stay which it did grant.* We respectfully submit that the foregoing alone is sufficient reason for denying the petition.

However, should the Court not consider the above sufficient to dispose of the matter, we submit the following in addition:

II.

THE UNPRECEDENTED CHARACTER OF THE STAY.

We think it is indisputable that the stay in question is absolutely unprecedented.* It is a stay *in limine,* to enable

*We shall show below that none of the cases cited by petitioners affords the slightest support for it, even by way of dictum.

the party obtaining it to prosecute *to final judgment in another court against another litigant of his own selection another lawsuit,* commenced simultaneously with the stayed suit,** to which preferred suit the stayed plaintiff is not made or invited to become a party (and to which he has no right to become a party on his own motion); and the *only* pretext for the stay is that the stayed suit is one of a large number of other suits commenced or about to be commenced against the defendant to the stayed suit, in which other suits the issues are such that the final judgment in the preferred suit *may* determine the issues in the stayed suit, or "substantially narrow them."† In short (since the stay was obtained immediately after the filing of respondents' bills, and is to run until the final decision in the preferred suit), the situation is in reality (as Judge Groner pointed out,—R., p. 272) precisely the same as if a litigant, threatened with a multiplicity of suits against him, all involving somewhat similar but concededly not identical issues, instead of bringing the usual bill in equity against his adversaries to combine their cases in one suit, takes the initiative by himself selecting only *one* of them as a defendant, and then, by separate independent bills against the others, enjoins these others from *commencing* their actions against him until he has disposed of his single hand-picked adversary! We believe our statement will pass unchallenged that no such suit has ever been attempted.

**The second of respondents' suits (*The American Water Works* case) was commenced only the day after the petitioners' suit against Bond and Share (A. R., p. 2).

†This is the petitioners' own language (Petition, p. 4).

III.

THE DAMAGES TO THE RESPONDENTS SHOWN BY THEIR BILLS.

But this is not by any means all. The respondents are relying not merely on the conceded general right of every litigant, *even where no special pecuniary losses from delays can be shown,* to insist that his suit be tried as promptly as may be consistent with fairness (a) to other litigants in the same court and (b) to his own particular adversary. The bills of the respondents show beyond peradventure how every day's delay (whether necessary or unnecessary) in obtaining a *final* determination that the Act is unconstitutional as to them, is causing them immense and irreparable damages. There is absolutely no attempt by the petitioners to deny that such is the fact,—in the light of which their effort to justify the stay by their offer of a *temporary* injunction pending the final decision of the *Bond and Share* case, becomes, we submit, wholly absurd.*

And the same is true of the petitioners' arguments based on their assurances that the respondents will not be criminally prosecuted for not registering, and that they may register under the Act "without prejudice". Here again, the respondents' bills show in the clearest possible manner (as the majority opinions of the Court of Appeals point out) that the really compelling reason which has driven the respondents to commence their suits is precisely the fact that the petitioners are at one and the same time vehe-

*See quotation, *supra,* page 4, from press release of Commissioner Landis only two weeks before the filing of respondents' bills.

mently asserting the Act to be constitutional against the respondents while refusing point-blank to take any action against them for their refusal to register. We believe the Court will be sufficiently familiar with the general provisions of the Act (the more drastic of which are fully set forth in the bills of complaint—R., pp. 25-28) to realize that until the Act is *finally* declared to be unconstitutional as against these respondents (assuming it to be unconstitutional, as their bills allege), the cloud which its existence on the statute books will cast on the validity of practically every important act done by them in their essential corporate activities will practically paralyze the normal conduct of their business.

And the bills also show clearly exactly why the irreparable damages which the respondents are thus daily incurring as unregistered companies would be, if anything, greater if they registered under the Act, and that these damages would not be in the least minimized by the petitioners' offer to permit the respondents to register "without prejudice" (R., pp. 9-22).

IV.

THE DAMAGES TO THE RESPONDENTS CAUSED BY THE STAY ITSELF.

It is obvious, therefore, that (despite the petitioners' offer of a temporary injunction and their assurances that the respondents may register under the Act "without prejudice") *the stay itself* will cause the respondents immense and continuing irreparable pecuniary damages, unless

(a) the final decision in the *Bond and Share* case is had before final decisions could, *but for the*

stay, have been had in the respondents' cases; *and unless*

(b) the decision in that case conclusively establishes that the Act is unconstitutional *against the respondents,* whatever it may decide as to Bond and Share.

The petitioners have not attempted to support their stay on any such theory as this. Indeed, it is clearly readable between the lines of their Petition for Certiorari that the petitioners have deliberately selected Bond and Share as the adversary party in their single "test" under the Act because they believe that they stand a better chance to get the constitutionality of the Act upheld against holding companies of the type represented by the Bond and Share system than against companies like the respondents, which are not engaged in interstate commerce, and against which the petitioners cannot prove the allegations of such commerce which they make in their bill against the Bond and Share group.*

*The Commission's bill in the *Bond and Share* case alleges that that company is the top holding company of a utility system operating in some thirty-two different states, many of which are inter-connected through interstate transmission facilities and that a substantial portion of these utility companies are engaged regularly in the interstate transmission and sale of electric energy and gas (R., pp. 65-66; 74-78). It alleges further that Bond and Share and one of its principal subsidiary holding companies, its co-defendant, American Gas and Electric Company, so *dominate and control* all of their subsidiary companies engaged in such interstate transmission and sale of electricity and gas that *Bond and Share, and American Gas, are themselves, in their own corporate capacity, engaged in the transmission and sale in interstate commerce of electric energy and gas* (R., pp. 74-82).

It further alleges that Bond and Share, through its wholly owned and completely dominated subsidiaries, Ebasco Services, Incorporated, and Phoenix Engineering Corporation, has negotiated, entered

This is the reason why the petitioners themselves do not assert that the issues in the *Bond and Share* case and the cases at bar are identical, but merely that the decision

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into and is performing service contracts with operating subsidiaries of certain holding company subsidiaries of Bond and Share (R., pp. 83-99). The great detail with which these service contracts and their subject matter is alleged, and the allegations that their performance amounts to a constant and regular traffic in interstate commerce by Bond and Share, show clearly that the Commission regards these facts as the facts *par excellence*, which will bring Bond and Share within the constitutional pale of the Act, if nothing else will.

The bills of complaint of both respondents, on the other hand, show that neither is engaged in activities in any way comparable to those alleged by the Commission against the Bond and Share companies.

The bill of each respondent alleges that it is not engaged in the business of sending or transporting or causing to be sent or transported goods or commodities in interstate commerce, and that such use as it makes of the mails or the instrumentalities of interstate commerce is merely incidental to the conduct of its intrastate business (R., p. 7).

The American Water Works bill shows that but little more than half of its capital assets consists directly or indirectly of investments in "public-utility companies" as that term is defined in the Act, approximately 40% of its total capital assets being represented by direct ownership of securities of water works companies. Substantially all of the remainder of its capital assets are represented by direct ownership of over 95% of the outstanding voting securities and certain other securities of a single holding company, The West Penn Electric Company, the great majority of the assets of which consist of substantially all of the common stock of two electric utility companies, which with their electric utility subsidiaries operate in a single area falling within adjacent parts of five States (A. R., pp. 4-8).

The North American bill shows that the public utility subsidiaries of that company comprise in the main, electric properties, with some small amount of gas and transportation properties, centered primarily in certain large urban communities; and that its subsidiary companies which do own and operate facilities for transmission of electric energy in interstate commerce engage in such activities as an incidental part of the predominantly intrastate business of the integrated systems to which they belong (R., pp. 4-7).

Moreover, as contrasted with the extensive and comprehensive services which the Commission's bill alleges that Bond and Share

in the *Bond and Share* case will "simplify the issues" and serve as a "valuable precedent" in the cases at bar.

Thus, even if the Act should be upheld in the *Bond and Share* case, the result of this stay to the respondents would be that probably more than two years after their suits had been commenced they would still be incurring the same continuing irreparable losses *and would continue to incur them for possibly another two years,* until respondents could proceed with the prosecution of their suits and show that they do not belong to the type of holding companies as to which Congress can constitutionally legislate in the manner set out in the Act.

In addition, as we pointed out in the court below, there is no certainty that there ever will be any decision, final or otherwise, in the Bond and Share case,—since Bond and Share might possibly determine to register or to put through some reorganization under which the present suit against it would be dismissed or discontinued. In which case also the stay itself will have caused the respondents to suffer irreparable damages for a wholly unnecessary period.

Company and American Gas and Electric Company render to their utility subsidiaries, *the North American bill shows that company not to be a party to any construction, sale or service contracts, and that it renders no such services to its subsidiary companies* (R., p. 7), and the American Water Works bill shows that that company is not engaged in activities in any way comparable to those in which it is alleged Bond and Share are engaged.

The extreme importance which the Commission attaches to the above-mentioned allegations of its bill against Bond and Share is manifested by the fact that a major part of the bill is devoted to such allegations.

V.

THE COUNTER-REASONS URGED FOR THE STAY.

The irreparable damages to the respondents caused *by the stay itself* being then undeniable, what counter-reasons have the petitioners urged in support of their stay?

Simply and solely that the Government should not be required to take *even the preliminary steps* in pleading and preparing for trial in *any* other case under the Act until it has prepared for trial, tried, and briefed and argued on final appeal its own specially selected "test" case against Bond and Share. Stripped of all rhetoric and sophistry, what the petitioners are asking for, and the "orderly and economical disposition of the controversy" which they say "is the Government's aim", is a one-hundred-per-cent. monopoly of the litigation involving the constitutionality of the Act until their own *single* case against their own specially selected defendant is finally determined by this Court. For it goes without saying that they did not need the unqualified stay they obtained for any other purpose. Without such a stay, if the preparation of the *Bond and Share* suit for trial, or the trial of it, should become at any time so arduous and exacting as to demand the practically entire time of the entire personnel of the Government legal departments assigned to the enforcement of the Act, the trial court would entertain a motion for, *and, on affidavits containing sufficiently specific allegations to justify it,* would grant any reasonable extension of time, adjournment, or other delay which might be shown to be necessary.

We have already stated that the unverified motion for the stay was wholly unsupported by affidavits, and the Court will also no doubt have observed that the allegations of the motion itself with regard to the situation in which the petitioners find themselves are so vague and general as to be wholly without probative value.*

The foregoing applies, of course, as well to the suits in the various district courts as to the other suits in the Supreme Court of the District of Columbia. As to the suits in the district courts, moreover, the complainants in them of course realized that they could obtain no relief in them against the petitioners unless the petitioners were willing to appear therein voluntarily, since the petitioners cannot be sued outside the District of Columbia without their consent. This the petitioners have refused to give, and, as the record shows (p. 238), they have already, by the appropriate motions under special appearances, obtained the dismissal of these cases against them. Their alleged apprehension that these cases *may* be recommenced against them in the District of Columbia (not one of them has yet been so recommenced) is surely the flimsiest of pretexts for the continued insistence by the petitioners that they are entitled to a stay of the sort which was granted to them by the trial court. If and when any of these cases

*In this connection we believe it is fair to state to the Court that the *Bond and Share* case will be tried on an agreed stipulation as to the facts in that case, without the taking of any testimony whatever, *and that the stipulation was signed by the parties on June 30 of this year.* So far, therefore, as the *Bond and Share* case is concerned, there remains for the Government nothing whatever except the briefing and argument of the case before the trial court and on appeal. And yet, in spite of this, *the Government still insists that it should not be required even to answer the respondents' bills until after the final decision of this Court in the Bond and Share case.*

are recommenced, petitioners can move in *them* for any stay or adjournment to which they may be entitled.

And lastly, and with respect to *all* the other cases brought against them, petitioners' point-blank refusal even to consider counsel's offer (R., p. 249) to agree upon a few test cases under the Act, to be consolidated for trial, in addition to the *Bond and Share* case, conclusively shows, we believe, that petitioners' motive in moving for the stay in question cannot possibly have been the fear of any real "multiplicity" of suits against them under the Act.

VI.

THE ALLEGED INSUFFICIENCY OF THE BILLS.

The petitioners intimate in various places that the respondents' bills do not make out a case for injunctive relief against an unconstitutional statute. If the petitioners really believe this to be the case and if they are right, a simple motion to dismiss would of course at once remove the multiplicity of suits which is the ostensible reason for their motion for a stay. Obviously, however, the question of the sufficiency of the bills in this respect cannot be raised on this motion for a stay; and just as obviously this alleged insufficiency of the bills affords no justification for the stay.*

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*In the court below petitioners made the following express admission:

> "The Respondents aver that whether the Petitioner's bill is ultimately determined to be with or without equity is irrelevant to the granting or denying of the stay. The Respondents did not move to dismiss Petitioner's bill" (R., p. 260).

VII.

THE AUTHORITIES.

The Authorities Showing That the Stay in Question Constitutes a Gross Abuse of Discretion.

The cases showing that the stay obtained by the petitioners constitutes a gross abuse of the trial court's discretion are overwhelming. In every one of the following cases the sought-for stay, which was refused, was less drastic and far-reaching than the petitioners' stay. In no one of these cases was the sought-for stay a stay

(a) *in limine*

(b) *until the final determination of*

(c) a simultaneously (or virtually simultaneously) commenced suit

(d) where the issues in the two suits were *not identical but merely similar, and*

(e) where the stayed party was not a party to the preferred suit.

We have found no case where a party has heretofore even thought of asking for a stay of the above sort. We call the Court's attention to the following cases defining and limiting the proper functions of a stay.

Mercantile Trust Co. v. *Lamoille Va. R. Co.*, Fed. Cas. No. 9432 (C. C. Vt. 1879);

Wadleigh v. *Veazie*, Fed. Cas. No. 17,031 (C. C. Me. 1838) (Opinion by Justice Story);

Loring v. *Marsh*, Fed. Cas. No. 8514 (C. C. Mass. 1864);

Checker Cab Mfg. Co. v. *Checker Taxi Co.*, 26 F. (2d) 752 (N. D. Ill. 1928);

National Motor Bearing Co., Inc. v. *Consolidated Motor Parts Co.*, 6 Fed. Supp. 811, 812 (E. D. N. Y. 1934);

Jefferson Standard Life Ins. Co. v. *Keeton*, 292 Fed. 53 (C. C. A. 4th 1923);

Toplitz v. *Miller*, 32 Fed. 744 (S. D. N. Y. 1887);

Johnson v. *N. Y. O. & W. Ry. Co.*, 3 Fed. Supp. 80 (E. D. N. Y. 1931);

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 Fed. 144 (D. N. J. 1904);

City of Detroit v. *Detroit City Ry. Co.*, 55 Fed. 569 (E. D. Mich. 1893);

Electric Vehicle Co. v. *Barney*, 143 Fed. 551 (S. D. N. Y. 1906);

Dolbeer v. *Stout*, 139 N. Y. 486 (1893);

Clark v. *Vilas National Bank*, 22 A. D. 605 (N. Y. 1897);

Rosenberg v. *Slotchin*, 181 A. D. 137, 138 (N. Y. 1917);

Ogden v. *Pioneer Iron Works*, 91 A. D. 394 (N. Y. 1904);

Swift v. *Finnigan*, 53 A. D. 76 (N. Y. 1900);

Jenkins v. *Baker*, 91 A. D. 400 (N. Y. 1904);

Bicalky Fan Co. v. *Mosier & Summers, Inc.*, 177 A. D. 372 (N. Y. 1917);

Dunfee v. *Childs*, 53 S. E. 209, 59 W. Va. 225 (1906);

Dalgarn v. *New Orleans Land Co.*, 109 So. 345, 161 La. 653 (1926);

Bergholm v. *Peoria Life Ins. Co.*, 63 S. W. (2d) 1064 (Texas 1933);
Dumphy v. *Belden*, 57 Cal. 427;
Cates v. *Mayes*, 12 S. W. 51 (Supreme Ct. Texas 1889);
Farmers' Co-op. Gin Co. v. *Harper*, 268 Pac. 256, 131 Okla. 224 (1928);
Wood v. *Lake*, 13 Wisc. 84 (1860);
Granger v. *Judge of Wayne Circuit*, 27 Mich. 406 (1873);
Boynton v. *Brown & Mathes*, 145 S. W. 242, 103 Ark. 513 (1912).

A *statute* providing for an unreasonably indefinite stay of actions on contracts has been held to be unconstitutional as impairing the obligations of the contracts. *Sliossburg* v. *New York Life Insurance Co.*, 244 N. Y. 482 (1927).

The Cases Cited by Petitioners.

Kansas City Southern Railway v. *United States*, 282 U. S. 760. This case is merely an illustration of the settled rule that a plaintiff's suit may be stayed for proper reasons (usually in order to avoid an unseemly conflict of jurisdictions), *where he has a complete and prompt remedy in another pending suit, in which he is already a party or in which he has the right to become a party.* In that case a number of railway companies had been parties to a single proceeding in which an order had been entered by the Interstate Commerce Commission. Two groups of companies attacked the order, one by a suit in Kentucky and the other by a later suit in Missouri. The Commission and the Government made no reference in their answer in the Missouri

suit to the prior suit in Kentucky. The Kentucky suit resulted in a decree sustaining the order of the Commission. The Commission and the Government thereupon filed an amended answer in the Missouri suit, and on the day of final hearing, setting up the decree in the Kentucky suit as an affirmative defense and claiming that, under the Act redistributing the jurisdiction of the Commerce Court, the jurisdiction of one district court could not be invoked to enjoin an order of the Commission after the order had been sustained by another district court. This Court overruled that affirmative defense, but sustained the Commission's order on its merits. In overruling the affirmative defense, this Court held that the court in Missouri committed no error in proceeding with the cause, notwithstanding the prior decision of the court in Kentucky, the opinion, however, stating that the court in Missouri might, in its sound discretion, have stayed the case before it pending the decision in the Kentucky case. The Court's reason for this statement was as follows (p. 763, italics ours):

> "The appellants," (the railway companies) "upon proper application *could have been allowed to intervene in the earlier suit * * * and could have presented there all of their grounds of attack upon the orders in question.*"

As the present respondents have no such remedy, the complete inapplicability of this case to the instant case is too plain for comment. The admitted object of the stay sought by the petitioners is to *prevent* the respondents from procuring an adjudication of their rights in *any* suit until after petitioners have prosecuted their own suit against Electric Bond and Share Company to a decision in this Court.

The remaining cases cited by the petitioners are equally inapplicable.

Friedman v. *Harrington,* 56 Fed. 860 (C. C. D. Mass., 1893). The bill was to enjoin the enforcement of a Massachusetts statute, alleged to be unconstitutional. *The question arose on a demurrer to the bill.* The court declined to pass on the demurrer, and continued the case *merely until the next term of the court.* His reasons for this short continuance were (a) that the question of the constitutionality of the statute *was already before the Supreme Court in two other cases which were likely to be "speedily reached", and that the property rights of the defendant were not endangered by this slight delay.*

Enelow v. *New York Life Insurance Co.,* 293 U. S. 379. Apparently this case was cited simply because of a single sentence in the opinion with reference to the general powers of courts to grant stays "to maintain the orderly processes of justice." As the facts show,* the Chief Justice was merely pointing out in this statement the plain distinction between the ancient equitable jurisdiction of courts of equity to enjoin actions at law, and the power of *all* courts—"a court of law as well as a court of equity"—to grant reasonable delays, continuances or other "stays" in any case, in order "to control the progress of the cause so as to maintain the orderly processes of justice".

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*The action was an action at law by the death beneficiary of an insurance policy to recover, after the death of the insured, the amount of the policy. The defendant pleaded affirmatively fraud in the procurement of the policy, and then moved, under Section 274(b) of the Judicial Code (28 U. S. C. 398) for an order staying the trial of the action at law until the issues raised by the defense of fraud had been tried in equity, *i.e.*, without a jury. The holding of this Court was that the defense was a good defense at law, and that therefore Section 274(b) of the Judicial Code did not apply, and that the defendant was not entitled to the "stay" which had been granted to it, and which, as the court said, was the statutory equivalent of an injunction in equity against the prosecution of an action at law.

No one disputes that the courts do not need the statutory authorization of Practice Acts in order to grant reasonable adjournments and other postponements of pending litigation. And of course the only difference between the ordinary extension of time, continuance, adjournment, or other postponement in a judicial proceeding, and what is ordinarily called a "stay of proceedings", is that the former are usually adjournments of *specific* steps or processes in the suit, while the word "stay" is usually applied to the form of adjournment which, during its continuance, applies to all further proceedings therein. But a "stay" in this latter sense is not necessarily, or usually, *a stay in limine for an indefinite time in the future.*

Pennsylvania v. *Williams*, 294 U. S. 176; *Gordon* v. *Ominsky*, 294 U. S. 186; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189. These are all cases of the relinquishment, *solely on the basis of comity*, of jurisdiction by *federal* courts in favor of *state* courts and other tribunals where the latter already had complete jurisdiction (*in rem* or *quasi in rem*) of the subject matter of the litigation, and full power to grant prompt relief *to all parties to it*—cases, that is, where this Court held that the federal courts should not interfere with the state courts which were proceeding properly in the administration of the affairs of their own insolvent domestic corporations.

They involved a mere choice between conflicting but equally competent and available jurisdictions, in either of which the plaintiff could proceed to a prompt and full remedy, so that he would suffer no loss through unnecessary delay. The "stays" at bar, on the other hand, involve a denial to the plaintiffs of a prompt and full adjudication of their cases in *any* jurisdiction (since petitioners cannot

be sued outside the District of Columbia), in face of the certainty that they will suffer great and irreparable losses during the long and enforced delay.

The principle of these cases has again been affirmed in *Commonwealth Trust Company* v. *Bradford,* 297 U. S. 613 (1936). In that case the Court, in holding that jurisdiction should not have been relinquished on the ground of comity, said (italics ours):

> *"Jurisdiction having been properly invoked, it became the duty of the trial court to determine the issues, unless required by rules based on comity to relegate the complainant to the State Court.*
>
> * * *
>
> "The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in *Pennsylvania* v. *Williams,* 294 U. S. 176, 79 L. Ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 79 L. Ed. 850, 55 S. Ct. 386, *supra,* is not applicable. In each of those cases we found conflict between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation."

Equally inapplicable is the case of *Di Giovanni* v. *Camden Fire Insurance Association,* 296 U. S. 64, cited by petitioners (petition, p. 26) for the proposition that the maintenance of a bill in equity to enjoin a multiplicity of suits does not depend upon exact identity of parties or issues. The court there was speaking of a situation where one party seeks to unite in a suit in equity numerous suits instituted against him at law. Such a suit, in effect, enjoins prosecution of the law suits by offering the plaintiffs in those suits *another forum* where all claims may be litigated

promptly in a single case. Obviously, in such a situation absolute identity of issues and parties is not essential, but only such identity as will permit the single court promptly to determine the rights of all of the litigants.

The rules of law which have heretofore been established with respect to stays are clear and unequivocal and they are the same in all courts, state and federal. There is no conflict between the decisions of other courts and they are in no way inconsistent with, but clearly conform to, the decisions of this Court bearing on such questions.

The majority opinions of the Court of Appeals have correctly applied these settled general principles. There is, therefore, no occasion for this Court, as requested by petitioners, to "define for the guidance of the federal courts the appropriate limits of a trial court's power and discretion in granting a stay."

Respectfully submitted,

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